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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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STATE OF WASHINGTON,
Respondent,

v.

ANDREW DAVIS SAGGERS,
Appellant.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

The Honorable Judge McCullough

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 3

IV. ARGUMENT 10

A. THE POLICE LACKED REASONABLE
SUSPICION TO DETAIN SAGGERS FOR
AN INVESTIGATORY STOP 10

B. ASSUMING *ARGUENDO* THAT POLICE
INITIALLY HAD REASONABLE SUSPICION,
THE INVESTIGATORY STOP WAS
EXCESSIVE IN SCOPE 19

1. SAGGERS' CONFESSION AND
CONSENT TO SEARCH WERE
ELICITED AFTER POLICE HAD
DETERMINED THE 911 CALL
WAS BOGUS 19

2. ONCE POLICE HAD
DETERMINED THAT THE 911
CALL WAS NOT LEGITIMATE,
THEY WERE NO LONGER
PERMITTED TO DETAIN HIM 20

C. THE CONFESSION AND
CONSENT TO SEARCH WERE
TAINTED BY THE ILLEGAL
DETENTION AND SHOULD HAVE
BEEN SUPPRESSED 22

V. CONCLUSION 24

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Bray,

143 Wash. App. 148, 154, 177 P.3d 154, 157 (2008) 21

State v. Duncan,

146 Wash.2d 166, 171, 43 P.3d 513 (2002) 10, 19

State v. Esterjose,

171 Wash. 2d 907, 259 P.3d 172 (2011) 24

State v. Franklin,

41 Wash. App. 409, 704 P.2d 666 (1985) 15

State v. Hopkins,

128 Wash. App. 855, 117 P.3d 377 (2005) 17

State v. Ibarra,

61 Wash. App. 695, 700, 812 P.2d 114, 117 (1991) 12

State v. Kennedy,

107 Wash.2d 1, 6, 726 P.2d 445 (1986) 11, 22

State v. Larson,

93 Wash.2d 638, 611 P.2d 771 (1980) 22

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

State v. Lee,

147 Wash. App. 912, 916, 199 P.3d 445, 447 (2008) 11

State v. Lesnick,

84 Wash.2d 940, 943, 530 P.2d 243 (1975) 12, 13

State v. Mendez,

137 Wash.2d 208, 214, 970 P.2d 722 (1999) 10, 19

State v. Northness,

20 Wash. App. 551, 557, 582 P.2d 546, 549 (1978) 12

State v. Rowe,

63 Wash.App. 750, 753, 822 P.2d 290 (1991) 11

State v. Sieler,

95 Wash. 2d 43, 47, 621 P.2d 1272, 1274-75 (1980) 11, 12

State v. Vandover,

63 Wash. App. 754, 760, 822 P.2d 784, 787 (1992) 17

State v. Walker,

66 Wash.App. 622, 626, 834 P.2d 41 (1992) 11

State v. Williams,

102 Wash. 2d 733, 737-38, 689 P.2d 1065, 1068 (1984) 21

TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS

Adams v. Williams,
407 U.S. 143, 147, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) 12

Brown v. Illinois,
422 U.S. 590, 599 (1975) 23

Florida v. J.L.,
529 U.S. 266, 268 (2000) 16

Florida v. Royer,
460 U.S. 491 (1983) 21

Illinois v. Wardlow,
528 U.S. 119, 125 (2000) 12

Terry v. Ohio,
392 U.S. 1 (1968) 11

United States v. Washington,
490 F.3d 765, 775 (9th Cir. 2007) 23

Wong Sun v. United States,
371 U.S. 471 (1963) 22

STATUTES AND OTHER AUTHORITIES

Wash. Const. Art. I, § 7 24

I. ASSIGNMENTS OF ERROR

A. The trial court erred in ruling that the initial detaining and shackling Appellant was justified by reasonable suspicion.

B. The trial court erred in its finding of fact that the interrogation of Appellant occurred at the same time or before officers concluded that the incident they were investigating did not occur.

C. Assuming *arguendo* that the initial detention was supported by reasonable suspicion, the trial court erred in finding that the Appellant's detention did not exceed its scope.

D. The trial court erred in finding that the appellant's confession and consent to search were not tainted by an illegal detention, and therefore erred in admitting the confession and fruits of the search.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Police received a phone call from an individual requesting a civil standby to repossess items from Appellant's garage shortly before 3am. Officer Shane Walter of the Kent Police Department denied the request because of the late hour. Minutes later, a 911 call was made from a payphone a mile away from Appellant's house by an anonymous individual alleging that someone at Appellant's address had assaulted a woman during the course of a drug transaction. The account in the 911 call was implausible, and it was not corroborated by what Officer Walter and

other officers saw when they went to Appellant's house to investigate. They officers summoned Appellant outside, where Officer CJ Mills handcuffed him and placed him in the back of a police car for several minutes. Officer Mills then left the car and stood outside Appellant's house while other officers conducted a sweep of Appellant's house and interviewed his roommate. After talking to the roommate, the other officers concluded that the incident reported in the 911 call had not occurred. While he was handcuffed, Appellant – who is Brady-listed – made the incriminating statement that he had a shotgun in his house, and then gave police consent to search his home. He showed them where the shotgun was and permitted them to seize it. Appellant argued unsuccessfully in the trial court that both the confession and fruits of the search should have been suppressed because the detention that precipitated them was illegal.

B. After testimony was taken, the trial court made findings of fact. They were largely stipulated by the parties. The main area of contention was whether Officer Mills knew that the other officers at the scene had already decided that the incident they were investigating had not occurred when he interrogated Appellant and obtained consent to search his house. If the consensus was that Appellant had not committed the

crime alleged, there was no justification for Appellant's ongoing detention.

III. STATEMENT OF THE CASE

Appellant appeals a conviction of Unlawful Possession of a Firearm in the Second Degree from King County Superior Court, Judge LeRoy McCullough presiding. The Appellant filed motions to suppress a confession and the fruits of a search pursuant to CrR 3.5 and 3.6. Testimony was taken on December 18 and 20, 2012. The Superior Court denied both motions. After Appellant lost the suppression motions, he opted to waive his right to a contested trial and instead had the trial court decide the case on the basis of a stipulated facts trial. He was convicted, and this appeal ensues.

The following facts were adduced at the suppression hearing:

On June 19, 2012, Kent Police Officer Shane Walter was assigned to the graveyard patrol shift. VRP 6. He responded to a call for a civil standby, VRP 8, at 14330 Southeast 258th Place in Kent, VRP 10, at approximately 2:45am. VRP 44. The caller's name was Kyle Thompkins, VRP 8, and he wanted to retrieve items from Saggars's garage. VRP 8. Thompkins told Walter that he was calling from outside Saggars's house. VRP 44-45.

Officer Walter told Mr. Thompkins that he would not assist him because it was an unreasonable hour to perform a civil standby. VRP 44-45. Thompkins became "agitated" and "upset" when Walter denied his request. VRP 46. Thompkins was "rambling," VRP 46 and told Walter that Saggars had a gun and was not permitted to have one. VRP 11-12. Thompkins also wanted Walter to tell Saggars that he was losing his house and had nothing left to lose. VRP 47. Thompkins did not mention any altercation occurring at the location. VRP 48. The call ended at 3am. VRP 48.

At 3:13:35am, Walter received a toned priority call over the police radio. VRP 18. The information relayed over the radio was that a man was standing on his porch outside 14430 Southeast 258th Place. VRP 13. He had an argument with a woman over a drug transaction. VRP 60. The man hit the woman, went inside, got a shotgun, and came back outside and threatened her with it. VRP 60. The woman drove off in a green Toyota. VRP 60. The caller gave the name of Abraham Anderson, VRP 14, and told dispatchers that he was calling from a gas station at 52nd Avenue Southeast and Southeast Kent Kangley Road. VRP 14. The gas station was about a mile from Saggars's house. VRP 14. There is a lake between the gas station and the house, so one must drive around it to go from one point to the other. VRP 14-15. The caller told the dispatcher that he had

seen the event 5 minutes prior while walking his dog. VRP 15. The caller said that there had been red and grey Suburban truck parked outside the house when he was there. VRP 16.

Officer Walter testified that there were aspects of the 911 call that seemed improbable. It was late for someone to be walking a dog. VRP 54-55. It was peculiar that someone would see an altercation over a drug transaction and then drive to a pay phone a mile away to report it to the police. VRP 59-60. He also testified that he never attempted to contact Thompkins to corroborate the 911 call story. VRP 62.

Walter arrived at Appellant's house at 3:18:42am. He parked his car a few blocks away from the house to scope out the scene and create a plan. VRP 21-22. Several other officers responded to the scene as well, VRP 23-24, including Officer C.J. Mills, who arrived at 3:24am. VRP 130. When he arrived, there was no one outside the house, VRP 25, and the lights were off, with no movement inside. VRP 25. He saw the Suburban parked in the driveway with another car parked behind it, blocking it in. p. 63. While Walter was outside the house, at 3:19:44, information was reported over the radio that the 911 caller said that while he was on the phone, he saw the Suburban drive past him near the gas station and then turn around in a restaurant parking lot. VRP 63-64. Walter attributed this discrepancy to a time delay on the CAD system.

VRP 64-65. He said that delays are typically a couple seconds, but a 7-10 minute delay was “possible” and “not absolutely unheard of” but “unlikely.” VRP 64-65.

Officers discussed the fact that this was the same house that was involved in the prior civil standby call. VRP 66; 169. Walter described it as something that "piques our interest." VRP 66. Sergeant Tim Barbour testified that he found the call suspicious because of the short time difference between the civil standby call and the shotgun call, and because the second caller said he was on foot, but called from some distance away. VRP 169-170. The officers discussed how the shotgun caller had said that the Suburban truck had driven past him, but when officers arrived on scene, it was in the driveway blocked in by another vehicle. VRP 184. They also discussed the implausibility of the timeline of events. 184-185. They discussed the possibility that it was actually Thompkins who made the second call, VRP 66, and Walter considered it "a distinct possibility." VRP 66. He also characterized it as “peculiar.” VRP 89. Officers discussed the possibility of the dispatcher listening to the two 911 calls to compare the callers' voices, VRP 134, but it did not appear that they actually did so. The probability that the second call was not legitimate did not alter the officers' response, VRP 66-67, because of the possibility that it was actually legitimate. VRP 89.

At 3:21:44, information came over the CAD that an officer had gone to the gas station in the hopes of making contact with the caller, and found the pay phone hanging by its cord. VRP 68.

Officers unsuccessfully made phone calls to try to contact the occupants of the house. VRP 27. They then made announcements over their loudspeaker system to contact the occupants of the house. VRP 28. First, this roused the dogs inside, who began barking, VRP 28, and then, after a few minutes, Saggars came to the door. VRP 28. Based upon the time it took for Saggars to arrive at the door, Walter believed that he was sleeping. VRP 71. Saggars did not bring any sort of weapon with him. VRP 72. He may have been wearing pajamas when he came to the door. VRP 136. Appellant was told to come outside, put his hands up, and then get on the ground. VRP 28. He obeyed every command. VRP 28. There was nothing about Appellant's demeanor that caused concern for officer safety. VRP 73. He was handcuffed, VRP 29, patted down for weapons — none were found — VRP 137, and placed in a patrol car. VRP 29.

Mills told Saggars that he was not being arrested, but he was being detained for an investigatory stop. VRP 117. Mills said on direct that he then read Saggars his Miranda rights. VRP 117. On cross-examination, however, he said that he did not remember if he immediately read Saggars

his Miranda rights or whether he read them after leaving and then returning to the car. 143-144.

After Mills put Sagers in the police vehicle, he walked back to the house to determine whether there were other people inside. VRP 139. His role was to intercept any people who left the house. VRP 139. He was aware that other officers were conducting a sweep of the house while he stood outside. VRP 140. He may have learned this over his police radio. VRP 140. He learned about the sweep while he was outside the car, 144.

Officers went inside Sagers's house without a warrant to conduct a sweep, and made contact with his roommate, "Eddie." VRP 32. Walter interviewed Eddie at the front door of the house. VRP 32. Eddie told Walter about Thompkins' visit to the house earlier that morning. VRP 32-33. After speaking to Eddie, Walter was convinced that the altercation had not occurred. VRP 77. The consensus among the officers after speaking to Eddie was that the altercation had not occurred. VRP 191.

While Mills was waiting outside, he learned from other officers that there was no female inside the house. VRP 144. He testified that he knew that other officers had contacted Eddie, VRP 159-160, but was not made aware of the content of the conversation between Walter and Eddie. VRP 148. He knew that the sweep had been completed before he returned to the car. VRP 159.

Mills questioned Sagers after he returned to the vehicle post-sweep. VRP 144. Sagers was still in handcuffs. VRP 151. Sagers told Mills that he thought Thompkins had made the call. Thompkins had come to Sagers's house earlier that night and had banged on the door to demand to get an engine lift out of the garage, but Sagers wouldn't let him in because it was too late. VRP 122. Eventually, Eddie came to the door and told Thompkins to go away. VRP 123. Mills asked Sagers if he had waved a shotgun at a woman, and he said no. VRP 123. He said he had never waved a shotgun at anyone. VRP 123. When Mills asked Sagers if he owned a shotgun, he said yes. VRP 123. At that point, Mills came to the conclusion that Sagers was not involved in the incident alleged and unhandcuffed Sagers, VRP 124, but did not tell him he was free to leave. VRP 152.

Shortly thereafter, Mills spoke to Sergeant Schanbacher, who had been conducting records checks. VRP 124. Schanbacher told him that Sagers was Brady-listed and ineligible to possess firearms. VRP 124. Mills then returned to Sagers and asked him if police could enter his house to retrieve the shotgun so he would no longer be in possession of it. VRP 124. Mills asked for consent to search his house for the shotgun and gave him *Ferrier* warnings. VRP 125. Sagers consented to the search. VRP 125. Mills and other officers entered the house and Sagers directed

them to the firearm, which they seized. VRP 126. The officers then left. VRP 126. Mr. Saggars was not arrested at that time. VRP 126.

Officers attempted to conduct a background check on Abraham Anderson, but were not able to locate any entries in their system regarding him. Walter testified that this was "bizarre" and "odd," but it was feasible that someone would have no entries if they had never had a driver's license or identification card or had any contact with the police. VRP 37. It is not clear from the record at what point during the incident this research occurred.

Walter called Saggars and recorded the conversation a couple days after the incident. VRP 38. During the call, Saggars told Walter the reasons why he thought the 911 call had not made sense. He cited the 3am dog walking and going to a pay phone a mile away to report an incident involving a shotgun. VRP 81. Walter responded, "these are all questions we were asking ourselves at the same time." VRP 81.

IV. ARGUMENT

A. THE POLICE LACKED REASONABLE SUSPICION TO DETAIN SAGGERS FOR AN INVESTIGATORY STOP.

Conclusions of law in a suppression order are reviewed *de novo*. *State v. Duncan*, 146 Wash.2d 166, 171, 43 P.3d 513 (2002); *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).

Saggers was detained and investigated because of an anonymous tip received via 911. He was subjected to an investigatory, or *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1 (1968). “Police may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity. A reasonable suspicion is the “substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Lee*, 147 Wash. App. 912, 916, 199 P.3d 445, 447 (2008) (citing *State v. Walker*, 66 Wash.App. 622, 626, 834 P.2d 41 (1992); *State v. Kennedy*, 107 Wash.2d 1, 6, 726 P.2d 445 (1986)). In Washington, reasonable suspicion is determined by a “totality of the circumstances” approach. *State v. Rowe*, 63 Wash.App. 750, 753, 822 P.2d 290 (1991).

Our state’s courts have often indicated their antipathy towards anonymous tips. “It is difficult to conceive of a tip more ‘completely lacking in indicia of reliability’ than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity.” *State v. Sieler*, 95 Wash. 2d 43, 47, 621 P.2d 1272, 1274-75 (1980) (internal citations omitted). Courts have characterized the concern about the “anonymous troublemaker” present in unidentified citizen

informant situations, *State v. Northness*, 20 Wash. App. 551, 557, 582 P.2d 546, 549 (1978), as “grave.” *State v. Ibarra*, 61 Wash. App. 695, 700, 812 P.2d 114, 117 (1991). “An informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient indicia of reliability.” *State v. Sieler*, 95 Wash. 2d 43, 47, 621 P.2d 1272, 1274 (1980) (citing See *Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972); *State v. Lesnick*, 84 Wash.2d 940, 943, 530 P.2d 243 (1975)). The court considers several factors, including the “nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant” to determine whether an anonymous tip is reliable. *Lee*, 147 Wash. App at 916, 199 P.3d at 447 (internal citations omitted). “Moreover, ‘the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.’” *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

Saggers’s investigatory stop was not based upon reasonable suspicion. The basis for the investigation would be best characterized as “unreasonable suspicion.” Shortly before the 911 call about the shotgun came in, Walter was on the phone with a rambling Kyle Thompkins, who was calling from outside Saggers’s house. He was clearly upset that police were not assisting him with a civil standby to retrieve items from

Saggers's house in the middle of the night. Absurdly, when he was denied the civil standby, he escalated his demand and told Walter that he wanted him to tell Saggers that he was losing his home and had nothing left to lose. Thompkins mentioned nothing about activity outside the house, and certainly not a drug deal or an altercation. Based upon Thompkins' call, police had no reason to believe that any illegal activity was occurring at Saggers's residence.

Thirteen minutes later, dispatch broadcasted an extremely unlikely story: that a man was walking his dog five minutes prior—which would have been at 3:07am—and saw an altercation outside of Saggers's house. One would assume that a person walking his dog in a residential neighborhood would live in that neighborhood, but instead of going home to call 911, the caller purportedly got into his car and drove to a gas station a mile away, on the other side of a lake. Further, the story about the altercation was bizarre on its face. The caller said that the fight was about a drug transaction, though he didn't say how he knew that. He said that the man hit the woman, went inside, got a shotgun, and threatened her with it. It seems improbable that a woman who had been hit during a drug transaction gone awry would wait outside her attacker's house for him to get a weapon and further brutalize her before driving away. That is

nonsensical and does not comport with “commonsense judgments and inferences about human behavior.” *Lee, supra*.

When Walter arrived at Saggars’s house five minutes later, at 3:18am, what he saw that the scene did not corroborate the details of the caller’s story. No one was outside. The lights were off, and there was no apparent movement inside the house. One innocuous detail of the caller’s description did appear to be corroborated—there was a red and gray Suburban parked in the driveway, blocked in by another vehicle. However, a minute later, at 3:19am, dispatch reported that the 911 caller said he had just seen the Suburban drive past him and turn around in a parking lot. Walter attributed this discrepancy to a time delay on the dispatch system. Of course, had there been a significant time delay, the incident would have taken place while Thompkins was present.

Police were not able to further corroborate the story in any way. An officer was sent to the payphone where the 911 call was placed and found it hanging on its cord. The Police did a records check on the name Abraham Anderson and were not able to find any documentation of his existence.

Because of the possibility that a gun may have been brandished, police were not remiss in investigating the incident. However, the police

did more than investigate. They ordered Sagers from his home. They handcuffed him, patted him down for weapons, found none, and detained him inside the back of a police vehicle for an unknown amount of time. Throughout, Sagers was compliant and gave no indication that he posed any risk to the officers.

In the absence of cases regarding obvious pranks, the state and the Superior Court relied primarily upon *State v. Franklin*, 41 Wash. App. 409, 704 P.2d 666 (1985) for the proposition that an anonymous tip about a gun constitutes a sufficient danger to the public to justify an investigative stop. In *Franklin*, an anonymous informant told police that he had seen a man with a gun in a restroom in a Greyhound station. He gave a description of the suspect's clothing, which police corroborated. The Court of Appeals found the stop permissible, stating that "the potential danger to the public posed by an armed individual calls for immediate action, and in such circumstances, the police may forego lengthy and unnecessary questioning of an informant in favor of an immediate investigation." *Id.* at 414; 704 P.2d at 670. *Franklin* is obviously distinguishable because the police there were not confronted with dubious circumstances undermining their suspicion. Nor was there

any potential danger to the public, as the alleged victim had driven away and the alleged suspect had retreated back inside his house.

Further, *Franklin* is not good law. In 2000, the Supreme Court of the United States held that an anonymous tip that a person has a gun is insufficient to give rise to reasonable suspicion. In *Florida v. J.L.*, 529 U.S. 266, 268 (2000), an anonymous caller reported to police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Police went to the bus stop and found three young black males, one of whom was wearing a plaid shirt. They approached and frisked him and found a gun. The Supreme Court found that, because of the lack of corroborating details about criminal activity, the search had to be suppressed. Notably, the Court ruled out an automatic firearm exception to the reasonable suspicion rule. “Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun.”

Later Washington state cases have also made it clear that the mere allegation involving a firearm by an anonymous tipster does not automatically give rise to reasonable suspicion. “*Franklin* does not stand for the proposition that potential danger to the public is a substitute for a

reliable informant. Rather, it is clear that under *Franklin*, danger posed to the public is a factor which may make an investigatory stop reasonable under the circumstances where there are already indications that the informant's tip was reliable.” *State v. Vandover*, 63 Wash. App. 754, 760, 822 P.2d 784, 787 (1992) (internal citations omitted). In *Vandover*, police responded to a radio report based on an anonymous tip that “a man in a gold colored Maverick was brandishing a sawed-off shotgun” in front of a restaurant. *Id.* at 755, 822 P.2d at 784. Officers saw Vandover get into a green Maverick in front of the restaurant. They followed him and pulled him over. He admitted to possessing a shotgun, and a handgun and cocaine were also found in his vehicle. On appeal, Division II found that the evidence should have been suppressed because the tip had no indicia of reliability. Unlike here, the police did not know what the basis of the informant’s knowledge was. But like here, the court found that the information provided was completely uncorroborated. *Id.* at 760, 822 P.2d at 787. Here, the tip had indicia of *unreliability*.

Likewise, no reasonable suspicion was found in *State v. Hopkins*, 128 Wash. App. 855, 117 P.3d 377 (2005). There, the police dispatch system broadcasted that an informant’s 911 call reported that a minor might have been carrying a gun. The description of the suspect was

“[[l]ight-skinned black male, 17 [years of age], 5' 9", thin, Afro, goatee, dark shirt, tan pants, carrying a green backpack and a black backpack.” *Id.* at 858, 117 P.3d 378. Approximately seven minutes later, the informant called again and asserted that the person was now at a pay phone at a certain address and that he thought the person put the gun in his pocket. *Id.* Officers went to the location and saw a black male who resembled the description. They did not observe a gun or any illegal, dangerous, or suspicious activity. *Id.* at 859, 117 P.3d at 379. They approached him, told him to put his hands in the air, and asked him if he had a gun, and he said he might. *Id.* He was frisked him and found a gun. He was then handcuffed and taken to the police station. *Id.* At his suppression hearing, officers admitted that they knew nothing about the informant. Although they had his name and cell phone number, they knew nothing more about him. The court noted that “a named and unknown telephone informant is unreliable because such an informant could easily fabricate an alias and thereby remain, like an anonymous informant, unreliable.” *Id.* at 863-846, 117 P.3d at 381 (internal citation omitted). Obviously, that is precisely what happened here. Further, like here, the *Hopkins* police were not able to corroborate any non-innocuous details of the tipster’s story.

In light of the foregoing, the police clearly had no reasonable suspicion to handcuff and detain Saggars.

B. ASSUMING *ARGUENDO* THAT POLICE INITIALLY HAD REASONABLE SUSPICION, THE INVESTIGATORY STOP WAS EXCESSIVE IN SCOPE.

Factual findings in a suppression order are reviewed for substantial evidence. Conclusions of law are reviewed *de novo*. *State v. Duncan*, 146 Wash.2d 166, 171, 43 P.3d 513 (2002); *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).

1. SAGGERS' CONFESSION AND CONSENT TO SEARCH WERE ELICITED AFTER POLICE HAD DETERMINED THE 911 CALL WAS BOGUS.

The trial court made a finding of fact that Mills's interrogation of Saggars occurred before or at the same time as the other officers' interview of Eddie. This is error, and one that is easily laid to rest, as Mills himself testified to the contrary.

Walter testified that officers entered Saggars's home without a warrant to conduct a sweep. VRP 32. They encountered and interrogated his roommate, Eddie. VRP 32. Eddie told officers about the Thompkins

incident and denied that an altercation occurred. VRP 32-33. After speaking to Eddie, the consensus among the officers, according to both Walter and Barbour, was that the 911 call was bogus. VRP 77; 191.

Mills himself testified that he knew that the sweep and the interrogation of Eddie occurred prior to his return to the car. VRP 159. He testified that he questioned Sagers after he returned to the vehicle post-sweep. VRP 144. Sagers was still in handcuffs. VRP 151. Sagers denied the incident, and said that he had never waved a shotgun at anyone. VRP 123. He did admit that he owned a shotgun, though. VRP 123. At that point, Mills concluded himself that the alleged incident did not occur and removed Sagers's handcuffs, VRP 124, but did not tell him he was free to leave. VRP 152.

Mills left the car and spoke to Sergeant Schanbacher, who had been researching Sagers and learned that he was not eligible to possess a firearm. VRP 124. Mills therefore returned to the car and asked for consent to search the house to retrieve the shotgun. VRP 125. Sagers complied with the request. VRP 126.

2. ONCE POLICE HAD DETERMINED THAT THE
911 CALL WAS NOT LEGITIMATE, THEY

WERE NO LONGER PERMITTED TO DETAIN
HIM.

“The scope of a permissible Terry stop will vary with the facts of each case. An investigative detention must last no longer than is necessary to satisfy the purpose of the stop. We ask whether it was reasonably related in scope to the circumstances which justified the interference in the first place. The scope and duration of the stop may be extended if the investigation confirms the officer's suspicions.” *State v. Bray*, 143 Wash. App. 148, 154, 177 P.3d 154, 157 (2008) (internal citations omitted). “It is ‘clear’ that Terry requires that an investigative detention must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.” *State v. Williams*, 102 Wash. 2d 733, 737-38, 689 P.2d 1065, 1068 (1984) (citing *Florida v. Royer*, 460 U.S. 491 (1983)).

In this case, the consensus among the officers, after speaking to Eddie, was that the shotgun incident had not occurred. This makes sense: there was no reason to disbelieve Eddie. He also corroborated the story about Thompkins, lending him further credibility. Mills knew that his

fellow officers had conducted a sweep and spoken to Eddie. Even if the investigation had been lawful at the outset, it should have ceased at this point. Saggars should not have been questioned further. He should have been immediately released from his handcuffs and from custody, not asked further questions about an incident that police definitely believed had not occurred. Although he was released from handcuffs, he was not allowed to leave. Instead, he was asked for consent to search his house. All of this clearly exceeded the scope of the investigative stop.

C. THE CONFESSION AND CONSENT TO SEARCH WERE
TAINTED BY THE ILLEGAL DETENTION AND SHOULD
HAVE BEEN SUPPRESSED.

The Appellant confessed to possessing a shotgun and granted consent to search his house during his unlawful detention. “No search can be reasonable if the initial detention is unlawful.” *State v. Kennedy*, 107 Wash. 2d 1, 8-9, 726 P.2d 445, 449-50 (1986). See also *State v. Larson*, 93 Wash.2d 638, 611 P.2d 771 (1980) (“Whether appellant's rights were violated begins with the stop of the car. If the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree.”); *Wong Sun v. United States*, 371 U.S. 471 (1963).

The Ninth Circuit has recently and extensively addressed, in this context, what evidence is “fruit of the poisonous tree.” It held that the proper inquiry is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *United States v. Washington*, 490 F.3d 765, 775 (9th Cir. 2007) (quoting *Brown v. Illinois*, 422 U.S. 590, 599 (1975)). The crux of the Ninth Circuit’s position on this issue is that, even if consent or a confession were given voluntarily during an illegal detention, it would still be suppressible if had not been purged of the taint. *Id.* In analyzing a potential purge, the court looks to the temporal proximity of the evidence and the illegal seizure; the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* at 776. The government bears the burden of demonstrating admissibility. *Id.* at 777. All of these factors militate suppression here. The confession and consent were given during the illegal seizure, and there were no intervening circumstances. The police misconduct is patent: red flags abounded that the payphone call was a prank, but the police pursued not only an investigation but a full custodial arrest.

Recently, in *State v. Esterjose*, 171 Wash. 2d 907, 259 P.3d 172 (2011), explicitly adopted the Brown analysis in interpreting Wash. Const. Art. I, § 7. It referred to this test as the “attenuation doctrine,” and found that the same three factors should be considered in determining whether a confession made subsequent to an illegal arrest could be admitted. 171 Wash.2d at 918-20; 259 P.3d at 189-79. Thus, under both state and federal law, the Saggars’s statement to Mills and the fruits of the consent search are inadmissible.

V. CONCLUSION

For the foregoing reasons, it is clear that the Appellant’s statements and consent to search his home were tainted by an illegal detention. Therefore, this Court should reverse the trial court’s rulings on the CrR 3.5 and 3.6 motions and vacate the Appellant’s conviction.

DATED this 27th day of June, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that I served a true and correct copy of the foregoing on counsel for the respondent at the office and address listed below by depositing the same in United States Mail, postage pre-paid on the 27th day of June 2013:

King County Prosecuting Attorney's Office
King County Courthouse, Room W554
516 Third Avenue
Seattle, WA 98104-2362

and I caused a copy of this document to be served upon the following entities by depositing said copy in the United States Mail, postage pre-paid on the 27th day of June 2013:

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/s/Sarah May Johnson
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